Benjamin Butler and Paul Jones d/b/a Ben's Construction Co. and Benjamin Butler Painting and Maintenance Co., Inc. *and* **Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO.** Cases 7-CA-20318 and 7-CA-20423

26 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

Upon charges filed on 16 February 1982 and 15 March 1982 by Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, herein called the Union, and duly served on Benjamin Butler and Paul Jones d/b/a Ben's Construction Co. and Benjamin Butler Painting and Maintenance Co., Inc., herein called Respondents, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued an amended consolidated complaint on 27 April 1982 against Respondents, alleging that Respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the amended consolidated complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. Respondents did not file an answer.

On 22 November 1982 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 30 November 1982 the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondents did not file a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The amended consolidated complaint and notice of hearing served on Respondents specifically states that unless an answer to the amended consolidated complaint is filed by Respondents within 10 days of service thereof "all of the allegations in the Amended Consolidated Complaint shall be deemed to be admitted true and may be so found by the Board." Exhibits submitted by counsel for the General Counsel show that, after Respondents had been notified of their failure to file an answer, they requested, on 29 April 1982, an additional 30 days to file an answer. On 7 May 1982 the Acting Regional Director for Region 7 issued an order extending the time for filing an answer to 7 June 1982. On 29 October 1982 Respondents again were notified of their failure to answer and were informed that unless they filed an answer by 8 November 1982 the General Counsel would file a motion for default judgment with the Board. No answer was received from Respondents by 22 November 1982, the date of the Motion for Summary Judgment.

No good cause for failure to file an answer having been shown, in accordance with the rule set forth above, the allegations of the amended consolidated complaint are deemed to be admitted to be true. Accordingly, we find as true all the allegations of the amended consolidated complaint.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENTS

Respondent Butler Painting and Maintenance Co., Inc., a Michigan corporation with its principal place of business at 16146 Wyoming, Detroit, Michigan, is a painting contractor. During 1981, a representative period, Butler Painting and Maintenance, in the course and conduct of its business, performed services valued in excess of $65,000 for employers who meet the Board's jurisdictional standards for direct inflow.

Respondent Ben's Construction Co., a Michigan co-partnership with its principal place of business

at 16146 Wyoming, Detroit, Michigan, is a construction contractor.

The amended consolidated complaint alleges that Butler Painting and Maintenance and Ben's Construction have been affiliated business enterprises with common officers, ownership, directors, management, and supervisors; that they have formulated and administered a common labor policy affecting employees of the two Companies; that they have shared common premises, facilities, telephone numbers, and advertising; that they have serviced each other's customers; and that they have held themselves out to the public and to their customers as a single integrated business enterprise. The amended consolidated complaint alleges, and we find, that Butler Painting and Maintenance and Ben's Construction are, and have been at all times material herein, *alter egos* of each other and a single employer within the meaning of the Act. We further find, on the basis of the foregoing, that Respondents are, and have been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Butler Painting and Maintenance and the Union have been parties to a collective-bargaining agreement covering the wages, hours, and terms and conditions of employment of Butler's painter employees. The contract, which is effective from 1 June 1980 through 31 May 1982, provides that Butler shall make monthly payments to certain designated fringe benefit funds and make monthly reports to the Union showing the amount owed per employee for each of the benefit funds. By virtue of the parties' collective-bargaining agreement, the Union has been and is now the exclusive bargaining representative of all painter employees employed by Butler Painting and Maintenance.

Since on or about 16 August 1981 Respondents have assigned work normally done by employees of Butler Painting and Maintenance to employees of Ben's Construction. Respondents have made these reassignments of work without applying the terms of the collective-bargaining agreement between Butler and the Union to the employees to whom the work was assigned. Specifically, Respondents have failed to apply provisions of the contract requiring the payment of certain wages and the making of monthly payments to the fringe benefit funds. Respondents also have failed to make the contractually required monthly reports to the Union.

On or about 14 September 1981 Respondents terminated employees John A. Jones and Abraham Howard for seeking the assistance of the Union with regard to their terms and conditions of employment. Since on or about 7 October 1981 Respondents have refused to allow the Union to make a contractually authorized audit of its books and records despite the Union's repeated requests that such audit be permitted so that it may determine whether Respondents have been, or are, shifting work away from the employees of Butler Painting and Maintenance.

The amended consolidated complaint alleges that Butler's painter employees constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act. It is alleged that Respondents reassigned unit work and terminated employees Jones and Howard in an effort to evade the obligations of the Butler-Union collective-bargaining agreement. Thus, the amended consolidated complaint alleges that Respondent's unilateral evasion, breach, and modification of the terms of the collective-bargaining agreement violated Section 8(a)(5) and (1) of the Act, and its discharge of employees Jones and Howard violated Section 8(a)(3) and (1) of the Act.

We find that Respondents violated Section 8(a)(3) and (1) of the Act by discharging employees John A. Jones and Abraham Howard on or about 14 September 1981. We also find that Respondents' unilateral reassignment of unit work and refusal to permit a contractually authorized audit of its books and records violated Section 8(a)(5) and (1) of the Act. However, despite our finding that Butler Painting and Maintenance and Ben's Construction constitute a single employer, we are unable to find that Respondents violated Section 8(a)(5) and (1) of the Act by failing to apply to the employees of Ben's Construction the terms and conditions of the Butler-Union contract in the absence of an allegation or statement of facts in the amended consolidated complaint that the employees of both entities constitute an appropriate unit.[1]

[1] Under the Supreme Court's opinion in *South Prairie Construction Co. v. Operating Engineers Local 627*, 25 U.S. 800 (1976), a single-employer finding does not necessarily establish that the employerwide unit is the appropriate bargaining unit. Furthermore, the criteria for finding a single employer are not the same as those for determining the appropriateness of the unit. *Peter Kiewit Sons' Co. & South Prairie Construction Co.*, 231 NLRB 76 (1977). Since the complaint herein neither alleges that a unit of employees of both Respondents is appropriate nor provides sufficient

Continued

Accordingly, we grant the General Counsel's Motion for Summary Judgment only to the extent consistent with our findings above. As for the amended consolidated complaint allegation that Respondents unlawfully refused to apply the contract to the employees of Ben's Construction, we remand that part of the proceeding to the Regional Director for appropriate action.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Benjamin Butler and Paul Jones d/b/a Ben's Construction Co. and Benjamin Butler Painting and Maintenance Co., Inc., set forth in section III, above, occurring in connection with their operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, we shall order that they cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we shall order Respondents to bargain collectively with the Union concerning the reassignment of work performed by bargaining unit employees, and to honor the terms and conditions of its collective-bargaining agreement with the Union with regard to bargaining unit employees. We shall order Respondents to offer John A. Jones and Abraham Howard immediate and full reinstatement to their former jobs and make them whole for any loss of earnings they may have suffered by reason of their unlawful discharge. Backpay is to be paid as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Benjamin Butler and Paul Jones d/b/a Ben's Construction Co. and Benjamin Butler Painting and Maintenance Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All painter employees employed by Respondent Butler Painting and Maintenance, excluding all guards and supervisors as defined in the Act and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The above-named labor organization has been and now is the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing since on or about 16 August 1981, and at all times thereafter, to bargain collectively with the above-named labor organization concerning the reassignment of unit work, and by failing to honor the terms and conditions of their collective-bargaining agreement with the Union with regard to bargaining unit employees, Respondents have violated Section 8(a)(5) and (1) of the Act.

6. By discharging employees John A. Jones and Abraham Howard for seeking the assistance of the Union with respect to their terms and conditions of employment, Respondents have violated Section 8(a)(3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondents Benjamin Butler and Paul Jones d/b/a Ben's Construction Co. and Benjamin Butler Painting and Maintenance Co., Inc., Detroit, Michigan, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, with respect to the reassignment of work performed by bargaining unit employees.

(b) Refusing to honor the terms and conditions of its collective-bargaining agreement with Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, with regard to bargaining unit employees.

(c) Discharging or otherwise discriminating against employees because of their union activities.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

---

facts to show that both Companies' employees share a community of interest, we are unable to find that the appropriate unit herein is of employerwide scope.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Bargain collectively with Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, with respect to the reassignment of work performed by bargaining unit employees.

(b) Honor the terms and conditions of its collective-bargaining agreement with Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, with regard to bargaining unit employees.

(c) Offer employees John A. Jones and Abraham Howard immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered due to the discrimination practiced against them, with interest, calculated in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Expunge from its files any references to the discharges of John A. Jones and Abraham Howard and notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

(e) Post at 16146 Wyoming, Detroit, Michigan, copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondents' representative, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that this proceeding be, and it hereby is, remanded to the Regional Director for Region 7 for appropriate action with respect to those allegations of the complaint upon which Summary Judgment has not been granted.

[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to bargain collectively with Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, with respect to the reassignment of work performed by bargaining unit employees.

WE WILL NOT refuse to honor the terms and conditions of our collective-bargaining agreement with the Union with regard to bargaining unit employees.

WE WILL NOT discharge or otherwise discriminate against employees because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, bargain collectively with the Union with respect to the reassignment of work performed by bargaining unit employees, and WE WILL honor the terms and conditions of our collective-bargaining agreement with the Union with regard to bargaining unit employees.

WE WILL offer immediate and full reinstatement to employees John A. Jones and Abraham Howard to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings they may have suffered as the result of their unlawful discharges, with interest.

WE WILL expunge from our files any reference to the discharges of John A. Jones and Abraham Howard, and WE WILL notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

BENJAMIN BUTLER AND PAUL JONES D/B/A BEN'S CONSTRUCTION CO. AND BENJAMIN BUTLER PAINTING AND MAINTENANCE CO., INC.